

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

MICHAEL D. DONNELLY
Claimant

VS.

SHAWNEE COUNTY
Self-Insured Respondent

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Docket No. 1,052,982

ORDER

Respondent requests review of the December 6, 2010 preliminary hearing Order entered by Administrative Law Judge Rebecca Sanders (ALJ).

ISSUES

The ALJ ordered respondent to provide claimant with medical care after concluding that claimant's low back pain complaints arose out of and in the course of his employment.

The respondent requests review of the decision alleging that claimant's complaints of low back pain are disingenuous in light of the contemporaneous medical records and the surveillance video of claimant's activities post-injury but pre-surgery. Moreover, Dr. Gilbert has opined that claimant's low back complaints are not causally related to claimant's accident, but rather to other personal conditions.

Claimant argues that the ALJ should be affirmed in all respects. Claimant maintains that his own testimony coupled with the opinions expressed by Dr. Zimmerman fully support the ALJ's factual and legal findings.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, the undersigned Board Member makes the following findings of fact and conclusions of law:

There is presently no dispute that claimant sustained a compensable injury to his right knee in April 2010. After a period of time when he was off work, claimant returned to work in an accommodated position which allowed him to remain seated a good deal of the

workday. According to claimant, he was favoring his right knee and limping during this period of time. The medical records generally support claimant's contention, in that Dr. Donald Mead, the treating physician, noted claimant's limp in his April 16 and April 23, 2010 records. On May 7, 2010, Dr. Mead noted claimant was demonstrating a "normal" gait but then on May 23, 2010, there is another notation of "limping". The May 27, 2010 office note is silent as to any limping.

Claimant was referred to Dr. John Gilbert and his June 10, 2010 office note states that claimant's "stance and gait are unremarkable". Physical therapy was recommended and the physical therapist's notes from July 1, 2010 noted that claimant is still suffering from "an antalgic gait". On July 8, 2010, Dr. Gilbert then noted claimant's gait to be "balanced" and referred claimant for a surgical consult with Dr. Brett Wallace.

During this period of time, (approximately June 21, 2010) claimant was assigned to an inventory position which required him to manage the prison's clothing inventory. According to claimant, 50-60 percent of his day was spent standing and the remainder he would bend down to put clothing away. He would have short periods of time when he was allowed to sit and work on the computer. But claimant testified that this job caused his low back to begin to hurt.

Claimant saw Dr. Wallace on August 9, 2010 (based on Dr. Mead's referral) and he observed diffuse tenderness on both the medial and lateral joint lines as well as fluid on the knees. There is no mention of claimant's gait. Claimant was ultimately told that surgery is a possibility.

On October 19, 2010, claimant went to Dr. Mead, the authorized treating physician, and expressed his low back complaints. Dr. Mead's note suggests that claimant told him the back pain had existed for approximately one month while claimant testified that he had experienced such pain much earlier, and that in the last month that it had become more pronounced. Dr. Mead prescribed medications that prohibited claimant from working altogether. This would continue for some time as surgery was scheduled and ultimately performed on October 26, 2010.

Respondent acquired surveillance video of claimant on October 20, 23 and 24, 2010 outside of his home. In this video, claimant can be seen walking, standing, sitting, smoking and at one point, working on his truck. While working on his truck he was sitting on some sort of low stool. He walks with no readily observable limp and his gait is even and measured. When seen arising from his chair, he moves slowly and seems to stop for a moment to establish his balance.

Respondent offered Dr. Gilbert's November 19, 2010 report in which he opines that claimant's low back complaints are not "causally related to the occupational injury of

April 7, 2010.”¹ Dr. Gilbert contends that claimant has degenerative disease of the lumbar spine “secondary to advancing age, obesity, smoking and constitutes the manifestation of the natural history of the disease”.²

In contrast, at his attorney’s request, claimant was examined by Dr. Zimmerman who determined that claimant developed mid lumbar spine pain as a consequence of the awkwardness of his gait due to the injuries affecting the right knee.

The ALJ was not persuaded by either the videotaped surveillance, or by Dr. Gilbert’s causation opinion and found that claimant’s present complaints of low back pain due to an altered gait are attributable to his April 2010 right knee injury. Thus, respondent was ordered to provide the requested treatment and designate a list of three physicians from which claimant could select one to direct his care.

Respondent has appealed and stridently contends that claimant failed to establish that it is more likely than not that he experienced an altered gait as a result of his right knee injury. Respondent points to the physicians’ notes that reveal claimant had a “normal” gait at least by July 10, 2010³ as well as the videotape which shows claimant walking and at least for some period, working on his truck.

The Workers Compensation Act places the burden of proof upon the claimant to establish the right to an award of compensation and to prove the conditions on which that right depends.⁴ “Burden of proof” means the burden of a party to persuade the trier of facts by a preponderance of the credible evidence that such party’s position on an issue is more probably true than not true on the basis of the whole record.”⁵

This Board Member has reviewed the entire record and concludes the ALJ’s Order should be affirmed. As claimant noted, Dr. Gilbert’s opinion is not necessarily dispositive of the issues in this appeal. Dr. Gilbert opines that claimant’s low back complaints are not due to the April 7, 2010 accident. Claimant does not allege a back injury occurred on that date. Rather, he alleges that his knee injury caused him to alter his gait and limp, thus causing him complaints of pain in his low back. This pain did not begin immediately, but over time, particularly when his modified duty job required him to stand 50-60 percent of

¹ P.H. Trans., Resp. Ex. A at 1 (Dr. Gilbert’ Nov. 19, 2010 letter report).

² *Id.*

³ Respondent’s Brief at 2 (filed Jan. 7, 2011).

⁴ K.S.A. 2009 Supp. 44-501(a).

⁵ K.S.A. 2009 Supp. 44-508(g).

the time. Thus, like the ALJ, this Board Member is not persuaded by Dr. Gilbert's opinion on this issue.

Likewise, this Board Member does not find the activities depicted on the videotape to be so devastating so as to say that claimant is manufacturing his low back complaints. Although working on a truck and sitting on a low stool might not be advisable for one who is having low back pain, it does seem that claimant's gait is, for lack of a better term, purposeful and balanced. It is as if he is deliberately moving slow and that deliberation, based on these facts, could be due to the pain he has voiced.

Simply put, claimant sustained a right knee injury and he has testified that he was limping following this injury. That complaint is corroborated by the medical records, although it is true that a reference to limping is not contained within each and every office note. And as his job required him to stand for longer periods of time, his back pain began to emerge and become more persistent. And Dr. Zimmerman confirms this causal connection. For these reasons, this Board Member finds the ALJ's Order should be affirmed.

By statute, the above preliminary hearing findings and conclusions are neither final, nor binding as they may be modified upon full hearing of the claim.⁶ Moreover, this review on a preliminary hearing Order may be determined by only one Board Member, as permitted by K.S.A. 2010 Supp. 44-551(i)(2)(A), as opposed to the entire Board in appeals of final orders.

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Rebecca Sanders dated December 6, 2010, is affirmed.

IT IS SO ORDERED.

Dated this _____ day of March 2011.

JULIE A.N. SAMPLE
BOARD MEMBER

c: John M. Ostrowski, Attorney for Claimant
Larry G. Karns, Attorney for Self-Insured Respondent
Rebecca Sanders, Administrative Law Judge

⁶ K.S.A. 44-534a.